No. 07-1524

FILED
JUL 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CARLOTA COPPER COMPANY,

Petitioner,

v.

FRIENDS OF PINTO CREEK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER CARLOTA COPPER COMPANY

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QUESTION PRESENTED

Whether 40 C.F.R. § 122.4(i) prohibits issuance of a "new" discharge permit under the authority of the Federal Water Pollution Control Act ("Clean Water Act"), National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342, in water bodies that do not meet all pertinent water quality standards—notwithstanding that the new source or discharge is shown not to have an adverse effect on existing water quality.

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are home builder associations that are composed of member organizations and individuals that construct single-family homes, apartments, condominiums, and commercial and industrial projects. The *amici*, or their members, are involved in thousands of construction projects across the nation that are in watersheds that do not meet all water quality standards established under the Clean Water Act ("CWA"). The lower court decision may foreclose such construction projects, thereby harming the *amici* and their members and reducing the supply of new housing stock.

The *amici* are as follows:

The National Association of Home Builders ("NAHB") is a national trade association incorporated in the State of Nevada. NAHB represents more than 235,000 builders and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include people and firms that construct and supply single-family homes, as well as apartment, condominium, commercial and industrial builders, land developers and remodelers.

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[1] The parties received timely notice of and consented to the filing of this brief. Letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to its preparation or submission.

It is the voice of the American shelter industry. Through its advocacy function, NAHB represents its members in legal proceedings affecting the use and development of their land. It is central to NAHB's organizational purpose to ensure that its members can use their property to the fullest extent allowed by law so that they may build and supply housing for all people throughout the United States, regardless of income level, race, or nationality.

NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members. NAHB was a petitioner in a CWA case, *NAHB v. Defenders of Wildlife*, 551 U.S. ___, 127 S.Ct. 2518 (2007), and attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as *amicus curiae* or "of counsel."

The California Building Industry Association ("CBIA"), a state affiliate of NAHB, is a statewide trade association that represents approximately 6,300 members—including homebuilders, trade contractors, architects, engineers, designers, suppliers, and other industry professionals. CBIA Members design and construct California's housing. CBIA's purpose is to advocate on behalf of the interests of its members, including, but not limited to, representation in regulatory matters and litigation affecting the ability of its members to provide housing, office, industrial, and commercial facilities for residents of California.

Building Industry Legal Defense Foundation ("BILD") is a non-profit and wholly-owned subsidiary of the Building Industry Association of Southern California ("BIA/SC"). BIA/SC is a non-profit trade association representing more than 2,050 member companies with more than 200,000 employees. The mission of BIA/SC is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians.

The Home Builders Association of Northern California ("HBANC") advocates for public policies and judicial decisions aimed at ensuring an adequate supply of quality, affordable housing in the San Francisco Bay Area with the goal of increasing home-ownership and promoting a healthy, growing regional economy.

SUMMARY OF ARGUMENT

When Congress does not direct specific regulatory action to address a difficult problem—such as how to improve water quality in polluted rivers, lakes, and streams—federal agencies, such as the U.S. Environmental Protection Agency ("EPA"), must necessarily formulate policy through the promulgation and application of rules to carry out broad statutory mandates. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). EPA was called upon to apply a rule the agency had promulgated to address this very water quality problem in the present case, *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir.

2007). Under the circumstances presented in the case below, EPA granted the Carlota Mining Company a permit under the National Pollution Discharge Elimination System ("NPDES")[2] to discharge effluent to a receiving water, *Pinto Creek*, that has ambient concentrations of dissolved copper in excess of state water quality standards.[3] Relying upon this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), EPA reasonably interpreted its own regulation, 40 C.F.R. § 122.4(i), to authorize "new" discharges in watersheds that do not comply with water quality standards—provided such discharges do not degrade overall water quality. *In re Carlota Copper Company*, 11 E.A.D. 692, 695 (EAB 2004). Such a result makes sense. A discharger cannot "cause or contribute" to a water quality violation where the

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[2] Dischargers under the CWA NPDES Program are required to obtain a permit from either EPA or, in states where NPDES authority has been delegated, the designated state permitting authority. 33 U.S.C. § 1342(a)(1), (b). Forty-five states currently have delegated NPDES programs. EPA, *State NPDES Program Authority*, http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf.

[3] Pinto Creek is "impaired," or in excess of applicable standards, for copper because, notwithstanding implementation by EPA of a total maximum daily load ("TMDL") for Pinto Creek, it is physically impossible to meet the current water quality standards for dissolved copper in Pinto Creek. See Arizona Department of Environmental Quality, *Draft Pinto Creek Site Specific Water Quality Standard for Dissolved Copper* 2-3 (March 12, 2007) ("*Arizona DEQ Site Specific Standard*"). The problem is that current standards for copper in *Pinto Creek* are set lower than natural background levels. *Id.*

discharge is not shown to have an adverse effect on water quality. EPA acted within its discretion when it rejected the argument that a permitting authority must demonstrate restoration to water quality standards for an entire water body prior to issuance of a single new discharge permit. EPA correctly recognized that following the logic utilized by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in the case below would perpetrate the very outcome this Court's decision in *Arkansas* sought to avoid, "adoption of a rigid approach that might frustrate the construction of new facilities that would improve existing conditions." *In re Carlota*, 11 E.A.D. at 695 (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992)).

In light of the tension between the lower court's decision in *Pinto Creek* and *Arkansas*, and because of the direct conflict between the lower court's decision and the decisions of the Supreme Court of Minnesota in *In re Cities of Annandale & Maple Lake*, 731 N.W.2d 502 (Minn. 2007) ("*Annandale*"), and the Virginia Court of Appeals in *Crutchfield v. State Water Control Bd.*, 612 S.E.2d 249 (Va. Ct. App. 2005),[4] *amici curiae* request that this Court grant the Petition in order to resolve the following issue:

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[4] The decision of the Virginia Court of Appeals in *Crutchfield* is "the decision of a court of last resort" for purposes of Sup. Ct. R. 10(a). The Virginia Supreme Court dismissed the appeal from the intermediate appellate court without opinion. *Crutchfield v. State Water Control Bd.*, No. 051148 (Va. Sept. 27, 2005).

whether issuance of a NPDES permit to a new source or discharger in an "impaired" watershed can be said, in every case, to "cause or contribute" to violations of water quality standards so as to invoke the 40 C.F.R. § 122.4 prohibition on NPDES permit issuance. The lower court, without any citation to pertinent legal authority, answered the question in the affirmative. The weight of authority, including the decision of the Supreme Court of Minnesota in *Annandale,* the decision of the Virginia Court of Appeals in *Crutchfield*, and the decision of the EPA Environmental Appeals Board ("EAB") in the present case, answers the question, correctly, in the negative.

ARGUMENT

I.

THE PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION UPON WHICH THERE IS A SPLIT OF AUTHORITY

Granting the Petition will allow the Court to resolve a matter of great national significance—whether EPA and the 45 states with delegated NPDES authority under the CWA are required to prohibit all "new" discharges to each and every water body designated as impaired under the CWA until the water body meets all water quality standards.[5] The

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[5] The number of "impaired" water bodies nationwide is approximately forty-five percent of rivers and streams and forty-seven percent of lakes, ponds and reservoirs. See EPA, *National*

(Continued on following page)

direct split of authority on this precise question invokes this Court's jurisdiction to grant certiorari under Sup. Ct. R. 10(a).

The dispute in this case centers on 40 C.F.R. § 122.4(i), EPA's regulatory interpretation of sections 301, 303, and 402 of the CWA. See 33 U.S.C. §§ 1311, 1313, 1342 (requiring NPDES permits to comply with water quality standards developed by states). Section 122.4(i) prohibits the issuance of "permits" for any new discharge that will "cause or contribute to the violation of water quality standards." The term "cause or contribute" is ambiguous.[6] EPA has interpreted that term not to apply where additional pollutants are "offset" by reductions elsewhere in the watershed. See *infra* note 9. Citing no authority other than the CWA's aspirational goals contained in 33 U.S.C. § 1251, the lower court overruled EPA's

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Water Quality Inventory: Report to Congress, 2002 Reporting Cycle at ES-2 (October 2007) ("*2002 Section 305(b) Report*"). However, the percentage of impaired water bodies in some states, such as California, is far higher, illustrating the profound impact that *Pinto Creek* could have on growth and development. See, *e.g.*, EPA, *National Assessment Database, Assessment Data for the State of California Year 2004*, http://iaspub.epa.gov/waters10/w305b_report_control.get_report?p_state=CA&p_cycle=. (hereinafter "*2004 California Assessment Data*") (indicating impairment in 92% of assessed rivers, streams, lakes ponds and reservoirs, and 97% of assessed bays and estuaries in the State of California).

[6] *Annandale*, 731 N.W.2d at 522 ("[W]e conclude that 40 C.F.R. § 122.4(i) is unclear and susceptible to different reasonable interpretations.").

interpretation of section 122.4(i). It then construed section 122.4(i) to mean that no new NPDES permits may be issued to a "new source" or a "new discharger" to an impaired water body until such time as that water body ceases to be impaired. See *Pinto Creek*, 504 F.3d at 1014 ("The error of both the EPA and Carlota is that the objective of [40 C.F.R. § 122.4(i)] is not simply to show a lessening of pollution, but to show how the water quality standard will be met if Carlota is allowed to discharge pollutants into the impaired waters"). In so holding, the lower court placed a *de facto* ban on issuance of new permits across a significant proportion of the western United States. See *In re Carlota*, 11 E.A.D. at 761-63 ("Simply put, [plaintiffs] propound a categorical ban on new sources and new dischargers into impaired water bodies").

The Minnesota Supreme Court interpreted the "cause or contribute" language of section 122.4(i) in the same manner as EPA and in direct conflict with the lower court. The *Annandale* court concluded that the CWA, as interpreted by this Court in *Arkansas*, 503 U.S. 91 (1992), and by the EAB below, does not require a categorical ban on discharges to impaired waters. *Annandale*, 731 N.W.2d at 520-21, 524. The court held that determining which discharges "cause or contribute" to violations of water quality standards can best be accomplished pursuant to a case specific factual inquiry—an inquiry best suited to the "scientific and technical" expertise of the state permitting authority. *Id.* at 524-26. Accordingly, the Minnesota

Supreme Court held that a NPDES permit could appropriately be issued in an impaired waterbody—provided the permitting authority determined, upon application of its specialized expertise and skill, that the new discharge would not harm water quality. *Id.*

The lower court decision is binding within the jurisdiction of that court, and it mandates an "all or nothing" interpretation of section 122.4(i). Outside the Ninth Circuit, regulators must choose between *Pinto Creek* and the flexible approach preferred by EPA and the courts in *Annandale* and *Crutchfield*. Unfortunately, watersheds do not obey political boundaries. And, as *Arkansas* illustrates, consistency in the interpretation of NPDES regulations across states is critical to preventing inter-state and inter-jurisdictional disputes and litigation. Additionally, in light of uncertainty surrounding section 122.4(i) after *Pinto Creek*, important wastewater infrastructure improvement projects and watershed trading programs—programs designed to improve water quality—are on hold and are likely to remain so until the uncertainty injected by *Pinto Creek* is removed. See, *e.g.*, Stephanie Showalter, Nat'l Sea Grant Law Ctr., *Pennsylvania's Nutrient Trading Program: Legal Issues and Challenges* 11 (2007) ("Legal minds are disagreeing ... on what the phrase 'cause or contribute' means, which makes it impossible to predict whether water quality trading programs will be found to be in compliance with the terms of the CWA and EPA regulations.").

The lower court decision merits review both because of the presence of a split of authority, see Sup. Ct. R. 10(a), and because it raises important issues of federal law—including the need for uniformity—that should be settled by this court. *Id.* at 10(c).

II.

THE DECISION OF THE NINTH CIRCUIT BELOW IS INCORRECT

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As the first step towards reaching this goal, the CWA required states to develop water quality standards for all water bodies within each state's borders. 33 U.S.C. § 1313(a). Water quality standards must contain three components: (1) one or more "designated uses" to be protected and maintained for each waterbody segment; (2) water quality criteria specifying the amounts of various pollutants that the water may contain without impairing designated uses; and (3) an antidegradation provision. See 33 U.S.C. § 1313(c)(2)(A).

In order to ensure that designated uses established by the states are met, the CWA prohibits the "discharge" of any pollutant, into "navigable waters" except in compliance with the CWA's provisions. See 33 U.S.C. § 1311(a). Thus, any "discharge" of pollutants, which the EPA has interpreted to include storm water runoff from

construction activities on sites greater than one acre, see 40 C.F.R. § 122.26(b)(15), must first be authorized pursuant to the NPDES Program. 33 U.S.C. § 1342. NPDES permits mandate implementation of technology based effluent limitations, 33 U.S.C. § 1311(b). New source performance standards established under section 306 of the CWA, 33 U.S.C. § 1316, apply to certain classifications of "new" discharges and may be far more stringent than the technology standards applicable to existing dischargers.

States are required to periodically assess whether water quality standards are being met in the waters within their jurisdiction. See 33 U.S.C. §§ 1313(d)(1)(a), 1315(b). Once assessed, the permitting authority is required to "list" any waterbody segments that are not anticipated to attain water quality standards through the use of technological controls alone. 33 U.S.C. § 1313(d)(1)(a) (hereinafter "303(d) list"). Once a state places an "impaired" water on the state's 303(d) list, it is required to develop a TMDL for that segment. 33 U.S.C. § 1313(d)(1)(C). A TMDL sets forth the total amount of point and non-point sources of pollution that a water quality limited segment can assimilate without violating water quality standards. 40 C.F.R. § 130.2(i).

A. New Discharges That Do Not Degrade Water Quality Do Not "Cause or Contribute" to a Water Quality Violation

Pinto Creek, *Annandale*, and *Crutchfield*, all involved proposed "new" discharges to "impaired" waters, and all turned on the meaning of the same federal regulation—40 C.F.R. § 122.4(i). Section 122.4 catalogs the circumstances (and exceptions) where NPDES permit issuance is prohibited, and the section applies whether EPA or a state is the NPDES permitting authority. See 40 C.F.R. § 123.25. The prohibition of section 122.4(i) is triggered if the permitting authority finds that a new discharge will "cause or contribute" to violations of water quality standards. Upon such a finding, the permitting authority may only issue a NPDES permit upon determining, before the close of the public comment period, that: (1) a TMDL has been developed for the impaired segment; (2) there is an adequate pollutant load allocation built into the TMDL for the proposed new source/discharger[7]; (3) all "existing" permitted point sources "are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R.

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[7] In many watersheds finding additional load allocations may be impossible. See, *e.g.*, *City of Arcadia v. State Water Res. Control Bd.*, 135 Cal. App. 4th 1392 (Cal. Ct. App. 2006) (upholding TMDL for "trash" with a waste load allocation of "zero" in the Los Angeles River).

§ 122.4(i)(1), (2).[8] The *Annandale* and *Crutchfield* decisions never addressed the narrow TMDL "exception" of section 122.4(i)(1), (2) because, unlike the scenario in *Pinto Creek*, neither the State of Minnesota, nor the Commonwealth of Virginia, had yet prepared TMDLs for the 303(d) listed waters at issue. Thus, both the *Annandale* and *Crutchfield* courts squarely faced the issue of concern to *amici*—whether every discharge to an "impaired" water body is irrebuttably presumed to "cause or contribute" to violations of water quality standards.

In *Annandale*, the proposed new discharger was a municipal wastewater treatment facility, which would allow the Cities of Annandale and Maple Lake to serve growing populations with superior quality wastewater treatment. *Annandale*, 731 N.W.2d at 524. The new discharge would add loadings of phosphorous to an unimpaired river that was tributary to the impaired Lake Pepin. The new discharge would be "offset" by significant reductions in phosphorous loadings from a nearby wastewater treatment facility. *Id.* The intermediate state appellate court enjoined the permit because it found that the discharge, unlike the discharge at issue in *Arkansas*, would have a "measurable impact" in causing phosphorous

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[8] As noted by Petitioner in its Brief at Pages 25-27, the Ninth Circuit appears to read-in additional requirements to Section 122.4(i)(2) that are absent from the pertinent regulatory language, and which make compliance with this "exception" to a "categorical ban" all but impossible.

impairment downstream. *In re Cities of Annandale and Maple Lake*, 702 N.W.2d 768, 774-76 (Minn. Ct. App. 2007). The Minnesota Supreme Court, relying on the EAB decision in the case *sub judice* and *Arkansas*, reversed. The court held that the new discharge was permissible because the state permitting agency was reasonably entitled to conclude that a discharge subject to mandatory offsets does not "cause or contribute" to water quality violations. *Annandale*, 731 N.W.2d at 516-22. Deference to the permitting authority's expertise in water quality matters was the deciding factor. *Id.* at 524.

The Virginia Court of Appeals was faced with a similar scenario in *Crutchfield*, 612 S.E.2d at 255. A plaintiff challenged the issuance of a NPDES permit alleging that Virginia's equivalent of section 122.4(i), 9 V. Admin. Code § 25-31-50(C)(9), prohibits new discharges into 303(d) listed waters. The *Crutchfield* court rejected the challenge because it concluded the levels of the pollutant in the discharge would not worsen dissolved oxygen levels in the receiving stream (which was "impaired" for low dissolved oxygen). The court deferred to the state permitting authority's determination that the discharge—though "new," of a significant volume (10 million gallons/day), and into a 303(d) listed water body, would nevertheless result in an improvement in water quality. *Id.* at 255. Again, agency deference was the deciding factor.

The lower court disagreed with these state court decisions. Ignoring the question of agency deference,

the court effectively held that *each and every* new discharge to an impaired waterbody, *per se*, causes or contributes to violations of water quality standards—whether the discharge is toxic, entirely benign, or offset by reductions in other permits. As the Minnesota Supreme Court recognized in *Annandale*, 731 N.W.2d at 520, such a broad interpretation of section 122.4(i)'s prohibitive effect is inconsistent with this Court's guidance that reviewing courts eschew inflexible interpretations of the CWA that "might frustrate the construction of new facilities that would improve existing conditions." *Arkansas*, 503 U.S. at 107-08.

The proposed permit at issue in *Pinto Creek* only authorized discharges during 10-year or 100-year flood scenarios when dilution and pollutant transport/dispersion would be at their peak. *In re Carlota*, 11 E.A.D. at 743-45. Nevertheless, EPA still required Carlota, as a condition of permit issuance, to clean up a nearby abandoned mine that was known to be a significant source of copper loading into the same stream segment. Thus, the permit would result in a net improvement in water quality. To the extent that Carlota's proposed mine would contribute any pollutant loadings to Pinto Creek, they would be extremely infrequent, highly diluted, and rapidly transported downstream. See *id.* at 769-70. Under such circumstances, it was not unreasonable for EPA to determine that the proposed discharge, as offset, would not cause or contribute to violations of water quality standards.

B. The Ninth Circuit Failed to Afford the EPA the Appropriate Level of Deference

As previously observed, section 122.4(i) is reasonably subject to differing interpretations. *Annandale*, 731 N.W.2d at 522. The Ninth Circuit's "all or nothing" approach to attainment of water quality standards improperly removes the decision of whether a particular discharge causes or contributes to violations of water quality standards from permitting authorities, who are most qualified to perform such site specific and highly technical evaluations. Cf. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983) (noting that agency deference is particularly appropriate where the matter involves scientific or technical matters within the agency's expertise).

The lower court failed to address the appropriate standard of review. Had it applied the proper standard of review—which requires that deference be accorded to an agency's interpretation of its own regulation unless the "plain language" dictates otherwise—it would have concluded that EPA's interpretation merits deference.[9] See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles*

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[9] EPA's interpretation of Section 122.4(i) herein is consistent with its national policy for reducing pollution in impaired waters. See, *e.g.*, EPA, *Water Quality Trading Toolkit for Permit Writers* 22, 24 (Aug. 2007) ("EPA interprets 40 C.F.R. § 122.4(i) to allow for a new source or new discharger to compensate its entire increased load through trading").

v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)) ("[T]he agency's interpretation of its own regulation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'").

Section 122.4(i) requires a careful balancing of competing policies and interests across 45 states and 10 separate EPA regions. Thus, EPA must be able to draw upon its expertise and specialized knowledge to make permitting decisions. See *Annandale*, 731 N.W.2d at 523. Consistent with *Arkansas*, where this Court noted that Congress intended to grant EPA significant discretion in the oversight and issuance of NPDES permits, 503 U.S. at 106-07, the lower court was required to defer to EPA's interpretation of its own regulation.

The lower court's decision to avoid the standard of review question altogether—declining to even explain why deference was inappropriate—was improper and it provides a basis for this Court's review.

III.

THE *PINTO CREEK* DECISION CONTRAVENES PUBLIC POLICY

The lower court's decision is contrary to law and will ultimately harm water quality and undermine other societal goals. In particular, the decision will directly interfere with the ability of *amici* to build

and supply housing for the growing population of the United States.

The NPDES program has been a great success story in many ways. See, *e.g.*, Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation* 3-4 (2d ed. 2002). The volume of pollutant loadings from traditional "point sources" has dropped considerably since enactment of the CWA in 1972—to the point where point sources are no longer the primary source of impairment in many watersheds. See Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 571-72, 632-33 (4th ed. 2003). However, for a variety of reasons, many U.S. water bodies still do not meet all designated water quality standards. See, *e.g.*, *2002 Section 305(b) Report*, *supra*, at 9, 11. Reasons for continued impairment are complex and can range from water quality standards that were cautiously set at inappropriately low levels[10] to continued "non point source" loading from "natural" sources (*e.g.*, minerals in soil, wildlife, wildfires),[11] air deposition of pollutants, and runoff from agricultural and silvicultural activities. See, *e.g.*, Fla. Admin. Code Ann. r. 62-303.100 (2006) ("[M]any water bodies naturally do not meet one or more established water quality criteria at all times, even though they meet their designated

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[10] *E.g.*, *Arizona DEQ Site Specific Standard*, *supra*, at 2-3.

[11] See *2004 California Assessment Data*, *supra* ("natural sources" cited as the most frequent source of impairment for Bays and Estuaries and Lakes, Ponds and Reservoirs).

use."). Whatever the cause of impairment, the regulatory result is the same—the state lists the water on the 303(d) list, prioritizes the effort, and eventually develops a TMDL.

The TMDL development process is difficult where the source of impairment is something other than permitted point sources—the scenario in the majority of TMDL development efforts in recent times. Cf. *2004 California Assessment Data, supra* (point source discharges not in top ten causes of impairment for most California water bodies). And most of the primary sources of non-point source loading are outside the control of permitting authorities under the CWA. See *Am. Wildlands v. Browner*, 260 F.3d 1192, 1197 (10th Cir. 2001) ("Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"); see also 33 U.S.C. § 1362(14) (exempting regulation of agricultural return flows and stormwater under NPDES program). Because only limited pollutant loadings come from permitted point sources, achieving attainment of all water quality standards is not possible in many watersheds. It is not, as implied by the lower court, as simple as issuing compliance schedules to all potential sources of pollutant loadings because many of these sources are not subject to the NPDES program. See *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) ("[T]he Act provides no direct mechanism to control nonpoint

source pollution"). Given the foregoing, the prohibition on permit issuance prior to demonstration of water quality standard attainment announced in *Pinto Creek* may be anticipated, as explained more fully below, to have a significant adverse effect on Western watersheds and the communities that rely on them.

A. *Pinto Creek* Could Be Interpreted To Require a Moratorium on Construction in Impaired Watersheds

The regulated community—including *amici* and their members—should be able to comply with the CWA in a way that is simple and efficient—as Congress intended. See, *e.g.*, Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, § 1068, 105 Stat. 2007 (1991) (requiring development of general permit regulations to govern stormwater from construction activities and other industrial processes). Long and drawn out permitting processes can render an otherwise meritorious land development project economically infeasible. *Pinto Creek*'s requirement to develop and implement a TMDL with compliance schedules, a process that can take twenty years or more to complete,[12] prior to turning dirt in an

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[12] See, *e.g.*, EPA, *Letter to California State Water Resources Control Board Regarding EPA Decision on California's 2006 303(d) Listings* (June 28, 2007) (TMDLs to be developed within 13 years of 303(d) listing); California Regional Water Quality Control Board, Santa Ana Region, *RESOLUTION NO. R8-2004-0037*,

(Continued on following page)

impaired watershed, would be catastrophic to the construction industry, local communities and permitting authorities alike.

Because construction activities in excess of one acre are administratively classified by EPA as "industrial" stormwater activities,[13] most land developments are now subject to NPDES construction general permits (CGP)[14] and required to comply with water quality standards[15] through the implementation of best management practices contained in stormwater pollution prevention plans ("SWPPP"). *Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964 (7th Cir. 2005).

Amici curiae are concerned that, taken to its logical extreme, the *Pinto Creek* decision—which itself arose out of EPA's regulation of a "new source" of industrial stormwater—could be read to prohibit

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Implementation Plan Attachment 2-20 (Dec. 20, 2004) (demonstration of compliance with water quality standards anticipated 16 years after completion of TMDL).

[13] See 64 Fed. Reg. 68,722 (Dec. 8, 1999); 40 C.F.R. § 122.26(b)(15).

[14] See 40 C.F.R. § 122.28.

[15] See 33 U.S.C. § 1342(p)(3)(A). EPA has determined that permitting authorities may satisfy the requirement to comply with water quality standards through the implementation of best management practices. See EPA, *National Pollutant Discharge Elimination System Storm Water Program Questions and Answers (Best Management Practices)* 8 (Jan. 21, 2004); *Divers' Envtl. Conservation Org. v. State Water Resources Control Bd.*, Cal. App. 4th 246, 257 (Cal. Ct. App. 2006).

land developers from obtaining coverage under a CGP or other NPDES permit, until nearby water bodies demonstrate attainment of all water quality standards. Though the process for seeking coverage under an existing general permit, via the filing of a notice of intent ("NOI") and preparation of a SWPPP, is admittedly very different from the individual NPDES permitting action at issue here, the Ninth Circuit has ruled, in *Envtl. Defense Ctr. v. EPA*, 344 F.3d 832 (9th Cir. 2003) that an NOI is the functional equivalent of a permit for certain purposes under the CWA stormwater regulations.[16] Thus, there is real risk to *amici* that courts will deem NOIs filed prior to commencing construction to be the equivalent of a "new permit" issuance, the triggering event for 40 C.F.R. § 122.4(i), and forbid construction even where the construction project will have no impact on water quality after complying with the CGP.

For the rule announced in *Pinto Creek* to apply to land development projects, the development would also have to be deemed a "new source" or a "new discharger." Putting aside the question of whether construction site runoff is ever properly characterized as a "point source" discharge in the absence of channelization of runoff that empties to a jurisdictional waterbody, activities that operate under existing CGPs are arguably not "new sources" or "new

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[16] Contra *Texas Indep. Producers*, 410 F.3d at 978 (NOIs are not "functional equivalent" of "permits").

dischargers" for purposes of 40 C.F.R. § 122.4(i). This is because most CGPs were previously issued and already authorize the types of discharges covered by the CGP. NOIs filed under a general permit, on the other hand, are "new." Thus, to the extent that courts follow *Pinto Creek* and *Envtl. Defense Ctr.*, there is real risk that construction sites in excess of one acre will be deemed "new sources" or "new dischargers" and precluded from operating under the CGP across entire watersheds.

B. The *Pinto Creek* Decision Will Prevent the Construction of Critical Infrastructure and Frustrate Smart Growth

To the extent that *Pinto Creek* is extended to proscribe developers from obtaining authorization to develop their properties, *amici* will be unable to provide critical housing and housing infrastructure to the Nation's burgeoning population. The U.S. Census Bureau estimates that the U.S. population will increase by almost 50% between 2000 and 2050. U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race and Hispanic Origin* Table 2a (Mar. 18, 2004), http://www.census.gov/ipc/www/usinterimproj/aa. Based on past trends most of this growing population will

live in urban and suburban areas of the U.S.[17]—the areas where impairment of water quality standards is also the most likely to occur. See, *e.g.*, Maryland Dep't of the Environment, *Maps and Water Resources Aid to Local Planning* (2006), http://www.mde.state.md.us/Water/HB1141/Water_Quality_Maps.asp (all of Baltimore City and most of Baltimore County impaired for nutrients).

To accommodate this growth, *amici* anticipate the need to construct 17-19 million new housing units in the United States over the next 10 years. Nat'l Ass'n of Home Builders, *Long-Term Trend Housing Production: How Will We Get There From Here? Long Term Forecast* (June 3, 2008). The question after *Pinto Creek* is whether 40 C.F.R. § 122.4(i) will be interpreted to preclude the construction needed to support the housing and utility needs of this burgeoning population.

New housing units must have adequate wastewater infrastructure to support them. However, as the *Annandale* case illustrates, communities throughout the Nation are experiencing rapid growth while

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[17] See, *e.g.*, U.S. Dep't of Agriculture, Economic Research Service, *Major Uses of Land in the United States, 2002, EIB-14*, at 30 (May 2006), http://www.ers.usda.gov/publications/eib14/ ("Urban land area has quadrupled from roughly 15 million acres in 1945 to an estimated 60 million acres in 2002. The Census Bureau reports that the U.S. population nearly doubled over this same period. Thus, urban land area has increased at about twice the rate of population growth.").

using outdated wastewater treatment facilities ("WTFs") operating at or near capacity. 731 N.W.2d at 524. These WTFs will need to be replaced or expanded in the near future just to accommodate existing population levels. See EPA, *The Clean Water and Drinking Water Gap Analysis* 14-15 (2002). The lower court's disapproval of new NPDES permits in the absence of demonstrated attainment of water quality standards, leaves communities that are looking to service future growth with few environmentally beneficial alternatives.

One alternative, which would presumably meet future needs in some cases, but which would not improve water quality, would be for an existing WTF to expand its capacity in place. An existing plant would generally not be required to meet the stringent requirements of new source performance standards, and permitting authorities would have reduced leverage to seek offsets as a condition of permit issuance—to the extent that offset programs are even viable after *Pinto Creek*.

Another second alternative would be to attempt to wait for the development of a TMDL and then try to comply with *Pinto Creek*'s highly restrictive interpretation of 40 C.F.R. § 122.4(i)(1), (2). However, the degree of load reductions required to demonstrate attainment of water quality standards, combined with the likelihood of extensive delay and *Pinto Creek*'s requirement to subject non-point sources of

pollution to "compliance schedules,"[18] would essentially preclude this option in all but the rarest of cases.

Finally, local governments could look to the use of septic tanks or pipelines that transport waste to non-impaired watersheds to accommodate growth. However, each of these options would impose additional and unnecessary costs on builders and on local communities without improving water quality. See, *e.g.*, EPA, *Decentralized Wastewater Treatment Systems, A Program Strategy* 2-3 (January 2005) (discussing systemic environmental concerns associated with septic tank usage).

Because urbanized areas are more likely to be "impaired" for at least one pollutant, *Pinto Creek* creates further incentive for developers to prefer greenfield developments over "infill" projects within existing urbanized regions. An environmentally proactive developer, of which there are many, might prefer to build closer to city centers—avoiding grading and clearing of currently undisturbed lands. However, *Pinto Creek* will frustrate this option by making it more difficult (or impossible) for a builder to obtain authorization to construct under a NPDES Stormwater permit and by frustrating expansion of

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[18] As pointed out by Petitioner at page 26, and as discussed at pp. 15-16 *supra*, permitting authorities do not have authority to impose NPDES compliance schedules on non-point sources of pollution.

wastewater treatment capacity in 303(d) listed watersheds.

CONCLUSION

The decision of the lower court does not serve the best interests of anyone. Both regulated entities and the environment lose where administrative rules are applied so inflexibly that important societal goals, such as construction of quality housing and enhanced wastewater treatment, are precluded for little or no environmental benefit.

This Court should accept certiorari in this case in order to clarify that CWA permitting authorities have the expertise and discretion to make reasoned judgments about whether a particular new discharge will cause or contribute to violations of water quality standards. The *de facto* moratorium announced in *Pinto Creek* is inconsistent with the CWA and *Arkansas*, and it should be overruled.

Dated: June 30, 2008

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Pennell v. City of San Jose, 485 U.S. 1 (1988); Yee v. City of Escondido, 503 U.S. 519 (1992); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994); Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Franconia Assocs. v. United States, 536 U.S. 129 (2002); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 537 U.S. 99 (2002); City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005);

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005); Kelo v. City of New London, 545 U.S. 469 (2005); S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370 (2006); Rapanos v. United States, 547 U.S. 715 (2006); John R. Sand and Gravel Co. v. United States, 128 S.Ct. 750 (2008); and Summers v. Earth Island Inst., No. 07-463, cert. granted, 128 S.Ct. 1118 (2008)